United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

306

APPELLANT'S BRIEF

Appeal No. 71-1116

UNITED STATES OF AMERICA, Appellee,

vs.

ISIA PORCHA, Appellant

APPEAL FROM JUDGMENT OF CONVICTION
AND SENTENCES OF UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
IN CRIMINAL NUMBER 971-69

Submitted By

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Counsel for Appellant (Appointed By This Court)

Submitted

April 14, 1971

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TABLE OF CASES AND AUTHORITIES CITED

*Indicates principally relied upon in support of argument.

STATUTORY MATERIALS RELIED UPON AND CITED

STATEMENT WHETHER THIS CASE HAS BEEN BEFORE THIS COURT ON APPEAL AT ANY PREVIOUS TIME

This case, United States v. Isia Porcha, No. 24,386 was before this Court and was remanded to the United States District Court for the District of Columbia in an opinion and order filed December 28, 1970. Purpose of the remand was for proceedings pursuant to 28 U.S.C. §2255 for vacation of sentencing and new sentencing in order that this Court could take jurisdiction by the appeal now made in the present case.

STATEMENT OF ANY DECISIONS OR OPINIONS PERTAINING TO THIS CASE

As noted above in United States v. Isia Porcha, No. 24, 386, this Court issued an opinion filed December 28, 1970 remanding the case to the United States District Court for the District of Columbia for further proceedings.

Reference to rulings - none

QUESTIONS PRESENTED FOR APPEAL

Appellant asks this Honorable Court to consider the following questions on appeal:

1. Whether the admission by appellant that "I did not mean to do it" should have been allowed into evidence against him where the admission was made to a threatening crowd of people eventhough not in response to a question from the police which had arrested him?

2. Whether it was proper to allow the jury to elect between counts of armed robbery and robbery in finding appellant guilty inspite of his motion that the prosecution be required to make the election?

3. Whether the court correctly instructed the jury that a knife is a dangerous weapon as a matter of law?

4. Whether there was any evidence upon which appellant could be found guilty of armed robbery?

5. Whether appellant could be convicted of armed robbery and assault with a dangerous weapon by another participant where the principal crime had been completed and the man who did the robbing had started to flee and appellant did not flee with him.

6. Whether the jury was given adequate instruction as to the importance of the defense of duress to appellant so that it could reasonably be expected to focus adequately upon this defense?

Appellant submits that adequate consideration of these questions will lead this Court to ordering that he be provided with a new trial.

I. JURISDICTIONAL STATEMENT FOR APPEAL

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 as an appeal from the judgment of the United States District Court for the District of Columbia in Criminal Number 971-69 on January 28, 1971 of 32 months to 8 years sentences on conviction of 5 counts of armed robbery and 2 to 8 year sentences on 4 counts of assault with a deadly weapon, all sentences to run concurrently.

II. STATEMENT OF THE CASE

Outline of Proceedings

On June 17, 1969, appellant, Isia Porcha was indicted in Criminal Number 971-69 in the United States District Court for the District of Columbia. The original indictment consisted of 22 counts alternately of armed robbery (22 D.C.C. §3202), robbery (22 D.C.C. §2901) and assault with a dangerous weapon (22 D.C.C. § 502). He was brought to trial on the indictment on January 21, 1970.

At the beginning of trial, counts 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the original indicment were dismissed for lack of witnesses to prove the offenses and some of the counts in the original indictment were renumbered. (Tr 4).[1]/ On January 22, 1970 in a jury trial, he was found guilty of counts 1,4, 6, 9 and 19 of the indictment charging him with armed robbery and counts 3, 7, 21 and 22 of the original indictment charging him with assault with a dangerous weapon. No finding was made on counts 2, 5, 8 and 20 of the original indictment charging him with simple robbery.

On March 12, 1970 appellant was sentenced from 32 months to 8 years on each of the counts of armed robbery (5) and assault with a dangerous weapon (4) of which he was convicted. No provision was made for any of the sentences to run concurrently. Prompt notice of appeal was not filed with the District Court and appellant after approximately 120 days delay attempted to appeal pro se to this Court in United States v. Isiah Porcha, No. 24,386. In an order dated December 28, 1970, this Court

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1/ In order to avoid confusion, the counts of the original indictment will be used unless specifically noted otherwise in this Brief.

remanded the case to the United States District Court for determination whether the sentences should be vacated pursuant to 28 U.S.C. § 2255 for want of effective assistance of counsel in perfecting appeal in order that appellant might have the opportunity of invoking the aid of this Court through a timely appeal.

On January 28, 1971, defense counsel at trial was allowed to resign and appellant with the assistance of newly appointed counsel had his March 12, 1970 sentences vacated. The sentences for the 5 counts of armed robbery were 32 months to 8 years, but the sentences for the assault with a dangerous weapon on 4 counts were reduced from 32 months to 8 years to 2 years to 8 years and all sentences were specified to run concurrently with each other. Appellant filed timely notice of appeal in this case.

The Trial

At the beginning of trial, appellant's counsel, Mr. Jones, moved that the Court require the prosecutor to elect whether to try appellant on either robbery or armed robbery. (Tr 4, 5). Defense counsel pointed out that the multiplicity of counts of robbery and armed robbery were highly prejudicial to appellant if he could be convicted on only one set or the other . (Tr 4,5). However, the court denied appellant's motion for an election of offenses and appellant went to trial on the indictment (Tr 5) except for the 9 counts which the prosecutor dismissed for want of witnesses (Tr 4).

A pretrial identification hearing was held which closely parallelled the trial testimony (Tr 7-74). Both the trial and pretrial identification testimony will be cited together in this Brief.

According to the testimony, Norman Laughlin drove a bus load of people from New York City to Washington, D.C. for the last day of the Cherry Blossom Festival on April 12, 1969. At about 7: 25 P.M. on that day, the bus was parked along the 1000 block of 4th Street, N.W. Some of the passengers were on the bus while others were off the bus receiving accomodations. At that time 3 strange men boarded the

bus and one of them who was carrying a pistol announced a stick-up of the bus. (Tr 9, 91). At first, the driver, Norman Laughlin and some of the passengers considered the event a joke . (Tr 91). Another man was identified as carrying a long shiny knife (Tr 129).

The testimony was overwhelming that at no time did appellant have either the gun or the knife. Mr. Laughlin testified that appellant was not the man with the gun. (Tr 94). Ruth Marshall, a passenger on the bus, stated that appellant was not the man with the gun. (Tr 115). Sybil Lawrence's testimony did not indicate appellant ever had either the gun or the knife. (Tr 120-124). Perlina Jackson stated that one man had the gun and another the knife (Tr 129) but that appellant had neither the gun nor the knife. (Tr 134). Dorthy McIntosh who was entering the bus as the 3 men were leaving indicated that the man with the gun left the bus before appellant left the bus (Tr 146) and made it clear that appellant had neither the gun nor the knife. (Tr 142-149). No other testimony indicated that at any time prior to, or shortly after the incident appellant had either the gun or the knife or directed the two men who actually had the gun and the knife.

Appellant stated that he had entered the bus with the other 2 men only because a few moments prior to the robbery of the bus, he himself had been accosted by the other two men who had forced him at gun point to take part in the armed robbery (Tr 176-177). He testified that he fled from the bus to get away from the actual bandits and that he was in the process of trying to reach the police at the time of his arrest. (Tr 177-178).

Appellant was alone arrested and identified while the 2 men with the gun and the knife were not apprehended. He was taken back to the bus where a large hostile crowd was present and while being threatned by the crowd (Tr 73-74, 12, 84, 85, 159, 160) stated, "I didn't mean to do it." Defense counsel moved that this statement be suppressed as evidence (Tr 85, 86) and later renewed his objection when it was introduced by the prosecutor (Tr 159), but

his objections were overruled. The court appears to have ruled against appellant on the ground that "it was not the product of in-custody interrogation" as claimed by the prosecutor because it was not in response to any questions asked of appellant by the police. (Tr 86).

As noted earlier, and as will be more specifically developed in the argument which follows, the jury was instructed by the court not to consider the robbery counts of the indictment unless it first found that appellant could not be convicted of armed robbery (Tr 201). Appellant was found guilty of all counts of the amended indictment except for those charging simple robbery for which no findings were made.

For the reasons more fully developed in argument, appellant submits that as a matter of both law and fact it was improper of the court and the jury to convict him.

III. SUMMARY OF ARGUMENT

A. APPELLANT'S STATEMENT, "I DID NOT MEAN TO DO IT" WAS IMPROPERLY ADMITTED INTO EVIDENCE OVER HIS REPEATED OBJECTIONS.

As outlined fully in argument, appellant's statement came while he was without the assistance of legal counsel, had been brought back to the bus before a large hostile crowd of people who were threatening him with physical injury by both their words and their actions. Although appellant's statement did not come as a result of any questions asked of him by the police, the statement did come as a result of accusations and threats by the crowd he was facing. Appellant therefore submits that it was a statement prompted by mob action and fear for his life irrespective of whether there was any in custody interrogation of him by the police. Such force is at least as coercive as in-custody interrogation by the police and therefore inadmissible. Brown v. Mississippi, 297 U.S. 278 (1936); White v. Maryland, 373 U.S. 59 (1963); Bram v. United States, 168 U.S. 532 (1897).

B. THE TRIAL COURT ERRED IN HAVING THE JURY ELECT BETWEEN THE COUNTS OF ARMED ROBBERY AND ROBBERY OVER APPELLANT'S TIMELY OBJECTIONS.

The trial court's allowance of the jury to select whether to convict appellant of either the counts of armed robbery or robbery was highly prejudicial. He was subjected to the same dangers the accused was in Russell v. United States, 369 U.S. 749, 768 (1962) where the prolixity in the indictment by numerous alternative counts would be confusing to the jury and prejudicial to the accused and the procedure used was not in conformity with Rule 8 of the Federal Rules of Criminal Procedure.

C. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A KNIFE IS A DANGEROUS WEAPON AS A MATTER OF LAW.

Not all knives are by law dangerous weapons. See, 22 D.C.C. §§302 and 3214 and Scott v. United States, 243 A.2d 54 (D.C. App. 1968). This had the effect of creating the impression in the mind of the jury that appellant had no defense to the case and was therefore highly prejudicial.

D. THERE WAS NO EVIDENCE THAT APPELLANT WAS GUILTY OF ARMED ROBBERY.

Appellant's motions for judgment of acquittal should have been granted because there was no evidence he had a pistol or a knife or voluntarily participated in the robbery of the driver and passengers of the bus.

E. IT WAS ERROR TO CONVICT APPELLANT OF ARMED ROBBERY AND ASSAULT WITH A DANGEROUS WEAPON UPON DOROTHY MACINTOSH.

The evidence shows that this robbery and assault took place by the gunman (not appellant) after he had left the bus and was making his get-away and appellant was no longer with the gunman. Hence, this robbery was a new and distinct crime.

F. THE JURY WAS NOT PROPERLY INSTRUCTED ON APPELLANT'S DEFENSE OF DURRESS.

Inasmuch as appellant's defense was that of durress, the jury should have been instructed that it should first consider this defense before considering

the elements of the crime in greater detail. Failure to focus the jury's attention to the importance of carefully considering the accused's defenses with great care impaired appellant's right to have the jury presume his innocence. However, where instructions are given as in this case, the jury would necessarily first consider whether there was any crime committed before focussing its attention upon appellant's innocence. By first finding the commission of a crime, then appellant was left in the position of having to prove his innocence in order to be presumed innocent.

IV. ARGUMENT

A. TRIAL COURT ERRED IN ALLOWING APPELLANT'S COERCED ADMISSION OF PARTICIPATION IN THE ROBBERY INTO EVIDENCE AGAINST HIM.

Appellant submits that his right against involuntary self incrimination was violated at trial by the court permitting his statement, "I didn't mean to do it" into evidence. Defense counsel upon learning of the admission moved that it not be allowed in testimony before the jury (Tr 86-87) and later prior to its admission before the jury. (Tr 159-160). The prosecutor argued its admissibility on the ground "it was not a product of in-custody interrogation." (Tr 86). Appellant, however, submits that the evidence clearly shows that the admission was a result of coercive circumstances which made the statement involuntary and therefore inadmissible. Pertinent passages of the testimony proves this point.

In the identification hearing, Officer Madden stated that following the robbery, he arrested appellant and handcuffed him (Tr 72) and took him back to the bus for identification. He stated:

"A I stepped out of the crusier first. I opened the door and took the defendant [appellant] out and we said nothing. We just stepped out of the cruiser. A large number of people were all outside the bus standing on the sidewalk.

They seemed to turn when they saw us and they came at us shaking their fists like this.

Q Did you have occasion to have a conversation with the people whose names I have mentioned [bus passengers[?

A Yes, sir.

Q What did they say about the man, if anything?

MR JONES [Defense Counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: The men and women-- There were numerous people on this bus and they yelled, "That's him. Get him." And some of them yelled worse threats. They did threaten.

Q At this time did the defendant say anything?

A Yes, sir; he did.

Q Had you asked him anything?

A No, sir.

Q What did he say?

A I didn't mean to do it." (Tr 73-74)

On cross examination, Officer Madden further testified concerning the circumstances of the admission or statement:

Q Did you say that at the time these people approached the defendant their fists were shaking in the air?

A Yes, they were.

Q And they said, "That's him. Get him."

A Yes, sir.

Q Did you have to intervene by getting between them and the defendant?

A Yes I did.

Q Was that to keep them from getting their hands on him?

A Yes it was." (Tr 84-85)

Officer Madden's testimony at trial was amplified with respect to the situation in which the statement was made:

A ". . . We had just stepped from the cruiser and faced them ["numerous people"] when they came toward us walking very fast. The people were shaking their fists and they were angry. I stepped front of the defendant and I kept the people that were coming toward us from approaching the defendant and I told them that they would have to stay back. . . .

Q Did these people say anything upon seeing the man with you?

A There were numerous people shouting, approaching us, shaking their fists--

.....

Q Fine. As a result, at this time that you have just described and the people coming toward you, did the person who you had arrested say anything?

A Yes, sir; he did.

Q What, if anthing did he say?

MR. JONES [Defense Counsel]: I cbject to this.

THE COURT: Overruled.

THE WITNESS: I didn't mean to do it." (Tr 159-160)/

Sybil Lawrence described the situation when appellant was brought back to the bus:

"We were-- it was a crowd of people and everybody was there. And the cops had him and we were standing in a group." (Tr 125).

Whatever the motivations the police had in taking appellant back to the bus for identification does not negate the fact that appellant was handcuffed and facing a crowd of numerous people who were swinging their fists and threatening him with harm. Eventhough the police may have been trying to protect him, their actions would only tend to show the dangerous situation faced by appellant when the statement was made. While the statement may not have been in-custody interrogation statements procured by questions from the police, the statements did come in a situation of physical threats and great danger to appellant. Long before it was held that in-custody interrogations per se might produce a tainted confession or admission, it was recognized that confessions resulting from mob action or threats would be inadmissible as evidence. Brown v. Mississippi, 297 U.S. 278 (1936); Stein v. New York , 346 U.S. 156 (1953); Lynumn v. Illinois, 372 U.S. 528 (1963); White v. Maryland, 373 U.S. 59 (1963); Bram v. United States, 168 U.S. 532 (1897); Payne v. Arkansas, 356 U.S. 560 (1958); and Fahy v. Connecticut, 375 U.S. 85 (1963). Both White and Bram

make it clear that the threats need not come from the police to vitiate the admission. And it is clear that the prosecutor's minimizing of the situation as only " a statement he made as people identified him," (Tr 86) does not accord with the undisputed testimony offered by Officer Madden whom the prosecution called as a witness as to the coercive circumstances under which the statement was given.

Although the statement can be viewed as exculpatory of appellant and consistent with his defense that he participated in the robbery only as a result of duress, the partial exculpatory nature of the statement does not per se make it admissible as pointed out by the Supreme Court in Miranda v. Arizona, 384 U.S. 436, 477 (1966), which noted that a truly exculpatory statement would not be introduced into evidence by the prosecution. In addition, Miranda by excluding admissions and confessions resulting from in-custody police interrogations did not overrule other cases which held that involuntary confessions or admissions are inadmissible. Miranda further emphasizes that the admission of involuntary statements of the accused into evidence requires a new trial because prejudice is presumed from the admission. The effect of the inadmissible statements can not be known as far as the jurors are concerned and it is not improbable that the admission of inadmissible evidence may change defense tactics in such matters as whether the accused decides to testify or not.

Appellant submits that as a matter of law the admission which was permitted into evidence over his objection requires that his conviction be reversed and he be given a new trial.

B. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO ELECT BETWEEN THE COUNTS OF ARMED ROBBERY AND UNARMED ROBBERY.

At the beginning of trial, defense counsel moved that prosecutor drop either the counts of armed robbery or robbery which constituted one-third of the counts of the indictment because such additional counts constituted multiplicity of counts. (Tr 4-5). Although the prosecutor dropped 9 counts of the original indictment for want of witnesses (Tr 4), appellant was still left with 13 counts in the indictment for trial.

Appellant received no benefit from having the counts of unarmed robbery in the indictment because the jury was expressly instructed not to consider the counts of unarmed robbery unless they found appellant not guilty of armed robbery. (Tr 201). And defense counsel pointed out in his motion to eliminate the non-armed robbery counts from the indictment that the prosecution could obtain an instruction on the lesser included offense which would have avoided prejudice from having the unarmed robbery counts removed from the indictment. (Tr 5).

The Supreme Court in Russell v. United States, 369 U.S. 749, 768, 82 S.Ct.1038, 8 L.Ed. 2d 240 (1962) stated that prolixity in an indictment is bad and prejudicial because

> "the indictment. . . left the prosecution free to roam at large-- to shift its theory of criminality so as to take advantage of each passing viccisitude of the trial and appeal."

The only provision in the District of Columbia Code for making charges in the alternative as far as law is concerned is 23 D.C.C. §201 (1967) which does not include any provision for charging armed robbery and non-armed robbery in the alternative. Rule 8 of the Federal Rules of Criminal Procedure does not make any provision for stating counts in the indictment in the alternative; although Rule 8 (a) and Rule 8 (e) (2) of the Federal Rules of Civil Procedure expressly permit the expression of alternative counts in a civil complaint. 8 Moore's Federal Practice § 8-4 states with respect to interpreting Rule 8 joinder under the Federal Rules of Criminal Procedure:

> "Rule 8 may be said to contain a built-in standard of prejudice which simply means that any form of joinder not permitted by the terms of the Rule. . . is conclusively (sic) presumed prejudicial."

Worthy of note is that the prosecution never took the position at trial that armed robbery and robbery are not inconsistent or alternative counts in the indictment. The prosecutor never made any objection to the court's instructions to the jury not to rule upon robbery counts if armed robbery was found nor demand a ruling on the robbery counts when the verdict was returned and the jury had not ruled on the robbery counts of the indictment. Hence, the prosecution conceded this point.

Directly connected to the denial of appellant's motion to require the prosecution to make an election between armed robbery and robbery is the prejudice resulting from the instruction that the jury must first consider the armed robbery counts of the indictment and not consider the robbery counts unless the armed robbery counts could not be sustained. (Tr. 201). The nature of this charge was such that it undoubtedly created some form of presumption that appellant must be guilty of armed robbery which in turn would infect the jury's reasoning with respect to the counts alleging assault with a dangerous weapon. Appellant was therefore denied his Fifth Amendment right to a fair trial and due process of law.

Appellant submits therefore that the prejudice resulting from denial of his motion to require the prosecution to make an election so deeply infected his entire trial with prejudice that on this ground alone and in connection with others, he is unequivocally entitled to have his conviction reversed and a new trial.

C. TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A KNIFE IS A DANGEROUS WEAPON AS A MATTER OF LAW.

The Court in giving its instructions to the jury stated:

> "You are instructed as a matter of law that both a gun and a knife are dangerous weapons." (Tr 210).

This instruction was plain and reversible error within the scope of Rule 52 (b) of the Federal Rules of Criminal Procedure. There is no law of any kind which declares all knives to be dangerous weapons.

Under 22 D.C.C. §302 the only knives declared to be dangerous weapons as a matter of law are the "dirk, bowie knife, butcher knife, razor. . ." In 22 D.C.C. §3214 knives considered dangerous weapons are "a dager, razor, stilleto or knife with a blade longer than three inches." Also mentioned is the "switch blade knife" as a dangerous weapon in another part of 22 D.C.C. §3214. It has also been recognized that other kinds of knives may be used for non-dangerous purposes and that possession of a knife other than those mentioned is not a crime. Scott v. United States, 243 A.2d 54 (D.C. App. 1968).

An instruction such as this is highly prejudicial because it is another way of conveying to the jury that as a matter of law appellant was considered to have no valid defense in the case. This clearly was erroneous. In this respect the situation is comparable to conduct of the court in cases such as United States v. Wyatt, __U.S. App. D.C. ___, ___ F.2d ____ (U.S. App. D.C. No. 24,106, March 2, 1971); Quercia v. United States, 289 U.S. 466, 469 (1933) and Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.Ed. 474, in which reversal of the conviction was found necessary in the interest of justice eventhough no formal objection was made at trial.

Appellant therefore submits that he is entitled to have his conviction reversed and a new trial granted on this ground.

THERE WAS NO EVIDENCE UPON WHICH THE COURT COULD FIND APPELLANT GUILTY OF ARMED ROBBERY.

None of the witnesses at trial ever claimed that appellant was armed during the robbery of the bus. Many of the witnesses stated positively that appellant had neither a gun nor a knife. (Tr94, 115, 129, 134, 146). He was used by the men with the gun and the knife to pick up the loot and turn it over to them and there is no indication that either of them made the gun or the knife available to him or that either was within his close reach. 22 D.C.C. § 3202 in defining armed robbery defines it as the "person" being"armed with any pistol or other firearm, or other dangerous or deadly weapon, including but not limited to , sawed off shotgun, shotgun, machinegun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, metallic or other false knuckles" in the commission of a robbery. Such a statute must be construed narrowly rather than liberally because it is a criminal statute. Brown v. United States, 56 A.2d 491 (D.C. App. 1949). Constructive possession of the weapon is not proven unless shown to have been in the close proximity of the person. Brown v. United States, 58 App. D.C. 311, 30 F.2d 474 (1929). And personal control over the weapon must be shown. Commonwealth v. Nickologines, 322 Mass 274, 76 N.E.2d 649, 651 (1948).

It logically follows from the restrictive definition of armed robbery that the District of Columbia's Aiding and Abetting Statute, 22 D.C.C. §105 cannot be invoked to sustain a conviction of armed robbery unless the person charged with aiding and abetting is also armed. Aiding and abetting statutes, like all other criminal statutes, are limited in their application and are not to be interpreted too broadly as is shown by Judge Learned Hand's opinion in United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938). Therefore appellant's motions for judgment of acquittal should have been granted at least insofar as the armed robbery counts of the indictment are concerned. (Tr 173, 191).

Appellant therefore submits that he is entitled as a matter of law to have his conviction reversed and the District Court ordered to reverse his convictions of armed robbery.

E. IT WAS ERROR TO CONVICT APPELLANT OF ROBBERY AND ASSAULT ON DORT[redacted]H.

Appellant was found guilty of counts 1 and 3 of the indictment charging him with armed robbery and assault with a dangerous weapon upon the complainant, Dorothy McIntosh. However, the evidence shows that this robbery took place after the people on the bus had been robbed (Tr 143), by "the man with the gun" who had left the bus while appellant was still on the bus (Tr 143-144) The man with the gun was by himself when the robbery of Mrs. McIntosh took place (Tr 146-147). The evidence is clear that appellant did not touch or handle or receive any of the proceeds of the robbery. (Tr 146-147) and that the robbery took place after flight from the bus had begun and the three men started to disperse. (Tr 146-147). The robbery of Mrs. McIntosh by the gunman was not necessary to effect the escape from the bus by the three men. Therefore, the case falls within the ambit of cases such as People v. Smith, 232 N.Y. 239, 133 N.E. 574 (1921) and State v. Opher, 38 Del. 93, 96, 188 Atl. 257 (1936), both of which hold that there can be no aiding and abetting of a new and distinct crime in a situation such as this where the new crime is not part of the overall crime which was committed.

Appellant accordingly submits that his conviction of crimes against Dorothy McIntosh must be reversed and thereafter that he be resentenced and have the opportunity to argue that his sentence should be reduced because the number of counts upon which he was convicted have been reduced. Inasmuch as the District Court imposed a lesser sentence when appellant was resentenced on January 28, 1971 insofar as the counts of assault with a deadly weapon are concerned and made all sentences run concurrently, the exercise of his right to a new sentencing would not be a futile step of no importance to him. Therefore, he should have the right to a resentencing if this court finds that he should be acquitted of the counts charging him with crimes against Dorothy McIntosh.

F. THE JURY INSTRUCTIONS WERE DEFECTIVE IN THAT THEY DID NOT CONCENTRATE ADEQUATELY ON APPELLANT'S DEFENSE OF DURRESS.

Appellant testified that he was the victim of a multitude of crimes by the man with the gun and the man with the knife who at gun point forced him to participate in the robbery of the bus and that as soon as he was able to flee from the bus and the two robbers he attempted to contact the police and report the robbery. (Tr174 et seq.). As is shown in the Statement of the Case, the passengers on the bus confirmed that he did not have either a knife or a gun and was apologetic when he picked up the fruits of the robbery for the man with the gun and the man with the knife. He alone of the three men who entered the bus was apprehended and served his function as the fall guy for the two actual robbers.

A defense such as appellant's at best is a difficult defense where every act or words of his was vulnerable to misinterpretation by those who claimed to have been robbed and assaulted. If innocent as he claimed he was, he would have no ability to locate and obtain the assistance of the actual robbers to prove his innocence and corroborate his statements of innocence. His own testimony and any circumstantial evidence which might be gleaned from the lips of witnesses hostile to him could be his only proof of innocence. He was therefore entitled to special care to assure that the

jury consider his affirmative defense of duress before it considered whether all of the elements of the crime had been proven and whether to find him guilty as charged. If the jury had found that he was the victim of duress which caused him to be involved in the robbery and other crimes charged, he would have been entitled as a matter of law to be found innocent. However, the instruction on duress was placed at the end of the instructions (Tr. 210) as an afterthought. The result may well have been an inference by the jury that appellant's affirmative defense was the last matter it should consider in weighing the evidence. Any inference to this weight of importance of considerations to the detriment of appellant would be clearly prejudicial.

It is an axiom of the law that jury instructions should not be argumentative, Atwell v. Watson, 204 Va. 624, 633, 133 S.E.2d 552, 559 (1963); H.W. Miller Trucking Co. v. Flood, 203 Va. 934, 936, 128 S.E.2d 437, 439 (1962) and cause the jury to pay special attention to certain evidence and disregard other evidence. Douglas Land Co. v. Thayer, 107 Va. 292, 302, 58 S.E. 1101, 1108 (1907) and Diamond Cab Co. v. Jones, 162 Va. 412, 416, 174 S.E. 675, 677 (1934). This same rationale strongly supports appellant's position that the improper placing of an instruction relative to his theory of the case can have the effect of being sufficiently prejudicial that his conviction must be reversed for this reason. Appellant's conviction for the offenses charged must therefore be reversed on this ground and a new trial ordered.

V. CONCLUSION

As developed in argument in this Brief, appellant is entitled to have his conviction reversed by this Court, acquittal of all charges or in the alternative some of the charges and a new trial and new sentencing for any, each and all of the reasons and grounds set forth in this Brief.

Most Respectfully Submitted

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Counsel for Appellant Appointed By This Court

CERTIFICATE OF SERVICE

I certify hereby that this 14th day of April, 1971, I delivered 2 copies of this Brief to the United States Attorney for the District of Columbia, United States Court House, Washington, D.C. 20006.

Noel H. Thompson
Counsel for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1116

UNITED STATES OF AMERICA, APPELLEE

v.

ISIA PORCHA, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT A. SHUKER,
JAMES A. ADAMS,
Assistant United States Attorneys.

Cr. No. 971-69

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OTHER REFERENCES

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial court erred in admitting into evidence appellant's spontaneous declaration made at the on-the-scene identification?
2. Whether the trial court erred in denying appellant's pre-trial motion to force the Government to elect between alternative counts of armed robbery and robbery?
3. Whether a jury instruction that as a matter of law a pistol and a knife are dangerous weapons was, under the circumstances, erroneous?
4. Whether there was sufficient evidence to find appellant guilty of each count of armed robbery and assault with a dangerous weapon?
5. Whether the location in the charge of the instruction on the defense of duress resulted in plain error?

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* This case has previously been before this Court as *United States* v. *Porcha*, No. 24,386. On December 28, 1970, this Court, in order to avoid unnecessary delay in considering the appeal on the merits, remanded this case to the District Court for vacation of appellant's sentence and for the re-entry of such sentence pursuant to 28 U.S.C. § 2255. On January 28, 1971, appellant's earlier sentence was vacated by the District Court, and a new sentence was imposed. This appeal was thereafter duly filed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1116

UNITED STATES OF AMERICA, APPELLEE

v.

ISIA PORCHA, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed June 17, 1969, appellant was charged with seven counts of armed robbery, seven counts of robbery and eight counts of assault with a dangerous weapon, in violation of 22 D.C. Code §§ 3202, 2901 and 502, respectively. On January 21, 1970, prior to commencement of the trial before the Honorable June L. Green, the Government's oral motion to dismiss three counts of each offense was granted, and the indictment was ordered redrawn and the counts renumbered. Appellant's oral motion to require the Government to elect between the alternative counts of armed robbery and

robbery was denied. Appellant's oral motion to suppress evidence relating to on-the-scene identifications and a statement made by appellant when identified was denied after a hearing. On January 22, 1970, a jury found appellant guilty of the four counts of armed robbery and the five counts of assault with a dangerous weapon. He was sentenced on March 10, 1970, to serve thirty-two months to eight years.

Appellant filed an untimely *pro se* notice of appeal to this Court. The Court, in *United States* v. *Porcha*, D.C. Cir. No. 24,386, decided December 28, 1970, in order to consider appellant's appeal on the merits, ordered the case remanded to the District Court and the sentence vacated and re-entered pursuant to 28 U.S.C. § 2255.[1] On January 28, 1971, Judge Green ordered the judgment and commitment entered on March 12, 1970, vacated and imposed a sentence of thirty-two months to eight years on the armed robbery counts and two years to eight years on the assault with a dangerous weapon counts, all sentences to run concurrently. This appeal followed.

At trial the Government presented five eyewitnesses to an armed robbery which occurred at approximately 7:25 p.m. on April 12, 1969. A tour group from New York, on a church outing to the Cherry Blossom Festival, was sitting in a bus parked in the 1000 block of 4th Street, N.W., waiting for other members of the group before leaving for New York (Tr. 8, 19, 31, 52, 89-90, 106, 121, 142). Three unknown persons (one subsequently identified as appellant) had been standing outside the bus for approximately five minutes when one of them (not appellant) knocked at the door and asked where the bus had come from. He then inquired if he could come aboard to see if he knew anyone. Upon entering the bus, he trained a pistol on the driver and announced a holdup. Appellant and the third man, armed with a knife with a "long, thin, shiny blade" (Tr. 41,

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[1] *See Rodriquez* v. *United States*, 395 U.S. 327 (1969); *Dillane* v. *United States*, 121 U.S. App. D.C. 354, 350 F.2d 732 (1965).

129), boarded the bus and began moving down the aisle collecting money from the passengers (Tr. 9-10, 21-22, 32-33, 40-43, 90, 94, 107-109, 121-123, 128-130, 189-190).

During the course of the robbery appellant made several statements. While on the bus he said, "I don't want to do it. I got a wife and children. I don't want to do it. Give me your money." (Tr. 32, 43, 121-122.) Upon leaving the bus he stated, "Don't nobody get off of this bus in 15 minutes, do you hear, or you will get killed" (Tr. 43, 131).

One tour member, Dorothy McIntosh, who had been absent from the bus, approached it during the robbery; realizing the situation, she ran completely around the bus to call the police. She was interrupted and robbed, however, by the gunman who had left the bus first. The other two robbers then left the bus and fled (Tr. 11, 43, 53, 59-65, 91-92, 96, 115-116, 130-131, 142-149). Each victim testified that during the robbery there was sufficient light to see and identify the robbers clearly, none of whom was disguised (Tr. 9, 22, 33, 42, 54, 90, 111, 126, 140).

A radio run was quickly broadcast describing appellant in general terms. A police cruiser parked at 4th and M Streets, N.W., then proceeded toward First Street, approximately three blocks from the scene of the robbery, where appellant, completely out of breath from running, was arrested. Within approximately ten minutes of the robbery, the officers returned appellant to the scene, where several police cruisers had gathered (Tr. 67-68, 71-84, 153-165, 167-172). Appellant was identified by several of the victims (Tr. 12, 22-23, 33, 44, 55, 93, 109-110, 133, 145). Members of the tour group uttered some threats against appellant, causing Officer Richard Mading of the Metropolitan Police to step between the group and appellant and tell them to stay back. Without any questions from police, appellant declared, "I didn't mean to do it" (Tr. 74, 85, 159-160). Searched at the police station, appellant had some bills

crumpled up in his pocket and other bills folded neatly in his wallet (Tr. 161-165).

Appellant testified that the money in his pocket came from a crap game which he had just left and in which he had played several times before. He knew other participants only by nickname, however, and did not present any of them as witnesses. Leaving the crap game, he walked past the tour bus, where two unknown men standing behind the bus stopped him and forced him at gunpoint to assist in the robbery. He claimed that he was first aboard the bus and that the door was open. Appellant acknowledged only his statement that he did not want to do it. He added that he gave all the money he collected to the gunman and was the first off the bus, at which time he ran. He stopped once to call two policemen in the Second Precinct. Unable to reach either of them, he kept running until arrested (Tr. 174-188).

Jury instructions in the case included a statement of the elements of the offenses of armed robbery and robbery, with a clear differentiation between the two offenses (Tr. 202-208). The jury was also instructed to consider the robbery counts only if they made findings of not guilty on the corresponding armed robbery counts (Tr. 207-208, 213-214). The jury was given the standard "red book" instruction[2] with respect to appellant's defense of duress (Tr. 210).

ARGUMENT

I. Appellant's statement at the on-the-scene identification was not the result of custodial interrogation by police officers and was therefore admissible.

(Tr. 72-74, 83-87, 158-160)

Appellant contends that his statement, "I didn't mean to do it," after he had been brought back to the scene and identified, was evoked by threats of crowd violence and was therefore a coerced confession in violation of

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[2] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 118 (1966).

the Fifth Amendment. *Miranda* v. *Arizona*, 384 U.S. 436 (1966), however, limits the right against self-incrimination to custodial interrogation. In *Miranda* the Supreme Court defined custodial interrogation to mean "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 (emphasis added).

Appellant was returned to the scene of the crime for prompt on-the-scene identification. No police interrogation or other questions preceded appellant's statement. The evidence disclosed that a justifiably angry group of tourists shouted and threatened appellant. There were, however, several policemen on the scene, one of whom testified that he kept the crowd away from appellant. Appellant, though he testified in his own behalf, nowhere stated that he considered himself in danger, that it appeared that the threats could be in any way realized, or that he was coerced by the threats.[3] The record clearly shows not that his statement was the product of any custodial interrogation but that it was spontaneously uttered, and spontaneous declarations are not barred by

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[3] Appellant cites seven cases for the proposition that "confessions resulting from mob action or threats would be inadmissible" (Br. 9). Only *Brown* v. *Mississippi*, 297 U.S. 278 (1936), however, involved mob action, and in that case police officers participated in extreme measures of torture to coerce confessions from three persons. *Brown* is thus distinguishable from the present case. Appellant also relies primarily on *White* v. *Maryland*, 373 U.S. 59 (1963), and *Bram* v. *United States*, 168 U.S. 532 (1897), to establish that threats of harm need not come from the police. *White*, however, involved no threats or coercion. It merely held that an uncounseled "guilty plea" made at a preliminary hearing could not be used against the defendant at his subsequent trial because, under Maryland law, the preliminary hearing was a "critical stage" of the proceedings at which the defendant was entitled to the assistance of counsel. In *Bram* a murder occurred on the high seas. The ship put in at Halifax, Nova Scotia, and while it was there, a Nova Scotian police detective interrogated the defendant. The court found that the policeman, through an exercise of complete authority over the defendant, elicited an inculpatory statement that was not freely and voluntarily made. Appellant's other cited cases are similarly distinguishable on their facts.

Miranda. *See United States* v. *McNeil*, 140 U.S. App. D.C. 3, 433 F.2d 1109 (1969); *Bosley* v. *United States*, 138 U.S. App. D.C. 263, 426 F.2d 1257 (1970); *Allen* v. *United States*, 129 U.S. App. D.C. 61, 390 F.2d 476, *supplemental opinion*, 131 U.S. App. D.C. 358, 404 F.2d 1335 (1968).

II. The Government was not required to elect between armed robbery and robbery, particularly when the trial court indicated that its instructions to the jury would state that a finding of guilty of the greater offense would preclude consideration of the lesser.

(Tr. 3-5, 201, 207-208, 213-214)

Appellant argues that the indictment containing four counts of armed robbery and alternative counts of robbery was prolix,[4] confusing and therefore prejudicial. Further, appellant speculates that the instructions to the jury not to consider the robbery counts unless appellant was found not guilty of the corresponding armed robbery counts created a presumption of guilt of armed robbery.

This court has held, however, that "[w]hen a greater and lesser offense are charged to the jury, the proper course is to tell the jury to consider first the greater offense, and to move on to consideration of the lesser offense only if they have some reasonable doubt as to the guilt of the greater offense." *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 292, 407 F.2d 1199, 1227 (1968) *(en banc)*, *cert. denied*, 393 U.S. 1120 (1969). It is also clear from *Fuller* that an indictment may contain alternative counts charging offenses arising out of the same transaction. *Cf. Evans* v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956). In this case the instructions to the jury precluded consideration of the

[4] Appellant's reliance on *Russell* v. *United States*, 369 U.S. 749 (1962), is unwarranted because in that case the indictment was held invalid in that it did not specify the basis upon which the defendants were charged. Prolixity was not mentioned.

robbery counts unless appellant were to be found not guilty of the corresponding armed robbery counts,[5] and no verdict was rendered on the robbery counts.

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[5] Following are relevant portions of the charge:

> Ladies and gentlemen of the jury, the indictment, which you will have before you, charges the defendant with four acts of robbery and each of the four acts is charged in two different ways.
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> In the First, Fourth, Seventh, and Tenth Counts, four respective acts of robbery while armed are charged. Each of these counts is followed by a count, specifically Counts Two, Five, Eight, and Eleven, which charges the same respective set of robberies while unarmed.
>
> If you find the defendant guilty beyond a reasonable doubt of any of the acts of armed robbery, you may not go on to consider the immediately following count of the same act of robbery while unarmed.
>
> But if you find the defendant not guilty of robbery while armed under any or all of the Counts One, Four, Seven, and Ten, then you may go on to consider the robbery count immediately following the armed robbery count or counts of which you have found the defendant not guilty. (Tr. 201).
>
> Counts Two, Five, Eight, and Eleven charge the offense of robbery. As I said before, if you find the defendant guilty of robbery while armed, you may not go on to consider the following count of robbery.
>
> However, if you find that the Government has not proven all of the essential elements beyond a reasonable doubt and, therefore, that the defendant is not guilty of robbery while armed, you may go on to consider robbery.
>
> The essential elements of robbery, all of which the Government must prove beyond a reasonable doubt, are the same elements that I just told you about when instructing you on the offense of robbery while armed except that the offense need not have been committed while armed.
>
> In other words, if under Count One you find that the Government proved beyond a reasonable doubt all of the essential elements except that the defendant or an alleged accomplice was armed, you must find him not guilty under Count One, but you may find him guilty under Count Two.
>
> The same applies to Counts Four and Five, to Counts Seven and Eight, and to Counts Ten and Eleven.
>
> On the other hand, if you find that the Government has failed to prove any essential element or elements of robbery while armed or robbery other than that the defendant or an alleged accomplice was armed, you must find the defendant not guilty under Counts One and Two. (Tr. 207-208.)

The jury was given similar instructions again at Tr. 213-214.

Referring to multiple convictions, this Court in *Fuller* v. *United States*, *supra*, indicated that an appellant, in order to win a reversal, must show circumstances making it reasonable to conclude that the jury was unable to keep the matters separate or may have been confused as to what constituted a particular offense. No such showing has been made in this case. Further, the adequacy of the instruction on the alternative counts, the content of the instruction itself not having been objected to, cannot be denied. No confusion or presumption of guilt was created by the instruction, nor does it present any other ground for reversal.

III. The instruction, not objected to at trial, that a knife was a dangerous weapon as a matter of law did not amount to plain and reversible error.

(Tr. 42, 131, 210)

Appellant claims that the instruction with respect to the knife was plain error within the meaning of Rule 52 (b), FED. R. CRIM. P., because the instruction assertedly conveyed to the jury a legal conclusion that appellant had no valid defense to the charges. Appellant recognizes that his falure to object at trial in order that the court could have corrected any defect in the charge forces him to rely on a claim of plain error. *See, e.g.*, *United States* v. *Green*, 137 U.S. App. D.C. 424, 424 F.2d 912 (1970). We submit that there was no error, plain or otherwise.

Appellant and five Government witnesses testified that one felon used a pistol in the robbery. One witness saw one of the robbers carrying a knife. The witness indicated at the pre-trial hearing that she was threatened by the man with the knife (Tr. 42) and stated at trial that she had started to get up during the robbery and was told to "sit down" by the man holding the knife (Tr. 131). The dangerous circumstances under which the knife was used are clear.

Further, contrary to appellant's speculation that the instruction prejudiced his defense, depiction of the knife as a dangerous weapon materially strengthened appellant's defense of duress. Duress requires that there be no reasonable opportunity to escape without committing the crime. Each witness other than appellant testified that the gunman was first to board the bus. It would have been reasonable for the jury to find that appellant, coming behind the gunman, had sufficient opportunity to escape. However, the presence of the additional dangerous weapon would have made it more difficult for him to escape and would have increased the danger of bodily harm. Clearly, inclusion of the knife with the instruction on the gun had no adverse impact on the verdict of the jury.

IV. The evidence was sufficient to sustain appellant's conviction on each count of armed robbery and assault with a dangerous weapon.

(Tr. 43, 89-191)

A. Offenses occurring on the bus.

Appellant urges an extremely narrow construction of the armed robbery statute and the aiding and abetting statute so as to require that he be found to have been actually armed in order to be convicted of armed robbery. 22 D.C. Code § 3202, however, provides for an additional penalty for persons convicted of a crime of violence whenever the person is armed with or has readily available "any pistol . . . or other dangerous or deadly weapon . . . ."

Appellant testified that, although reluctant, he was an active participant in a robbery during which at least one person was armed with a pistol. Appellant's participation in the offense and his proximity to the pistol lead to the conclusion that the weapon was readily available to him. Further, one witness testified that appellant threatened to kill anyone who got off the bus within fifteen minutes (Tr. 43, 131). Other federal appellate

courts in similar circumstances have found no difficulty in applying the normal rule that an unarmed principal is responsible for the acts of his armed co-principal and therefore equally guilty of armed robbery. *United States* v. *Bux*, 261 F.2d 807 (3d Cir. 1958); *accord*, *Kaufman* v. *United States*, 325 F.2d 305 (9th Cir. 1963).

In addition, 22 D.C. Code § 105 by its terms provides that an aider and abettor shall be charged as a principal and that the statute shall apply to all crimes. The evidence is uncontradicted that appellant was an active participant in the robbery. Thus it is clear that a jury could find that appellant associated himself with the venture and sought by his actions to make it succeed. *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 303 F.2d 411, *cert. denied*, 370 U.S. 946 (1962); *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938).

B. ***Offenses occurring outside the front door of the bus.***

Appellant alternatively suggests that the convictions for the assault on and robbery of Dorothy McIntosh should be reversed because they took place outside the bus and were not a means of effecting escape. His theory appears to be that they constituted new and distinct crimes in which he did not aid and abet.

The evidence showed that Mrs. McIntosh approached the bus while the robbery was in progress. She began yelling for the police as she ran around the bus. She was halted by the gunman, the first person off the bus, who took her purse. The other men, including appellant, then fled, appellant passing within six and one-half feet of Mrs. McIntosh (Tr. 144).

As set forth above, a principal is normally responsible for the acts of a co-principal. Also, because of his participation and assistance in the success of the robbery, a reasonable juror disbelieving appellant's claim of duress could reasonably find appellant guilty of aiding and

abetting in the assault on and robbery of Mrs. McIntosh. Under the applicable law,[6] this was sufficient.

V. The instructions, considered as a whole, adequately informed the jury as to the law with respect to the defense of duress.

(Tr. 194-215)

Appellant speculates that as a result of the court's placing the duress instruction last, the jury consequently gave to that defense less weight than it would have otherwise commanded. No objection was made at the trial with respect to the location of the instruction, and thus appellant should be precluded from raising the issue here. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); Rule 30, FED. R. CRIM. P. To win reversal he must make a showing of plain error, which on this record he cannot do.

This court has stated that "[i]n evaluating an asserted error in a portion of a jury instruction we must, of course, examine the charge as a whole to determine whether there was a likelihood of misleading the jury to the extent that it is more probable than not that an improper verdict was rendered." *United States* v. *Thurman*, 135 U.S. App. D.C. 184, 185, 417 F.2d 752, 753 (1969), *cert. denied*, 397 U.S. 1026 (1970); *see Suggs* v. *United States*, 132 U.S. App. D.C. 337, 407 F.2d 1272 (1969). Appellant's assertion that the jury was or could reasonably have been misled by the location of the duress instruction can only be described as speculation. The instruction itself was a verbatim recitation of the standard "red book" duress instruction and certainly cannot be classified as argumentative or abstruse. Considering the totality of the charge, we submit that the location of this particular instruction could not have prejudiced appellant's defense.

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[6] *United States* v. *Harris*, 140 U.S. App. D.C. 270, 435 F.2d 74 (1970); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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